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In the

Supreme Court of the United States

October Term, 1984

Douglas Toland ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

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19 pp

QUESTION PRESENTED

The extent to which the "good faith exception" to the warrant requirement in *U.S. v. Leon*, 104 S.Ct. 3405 (1984), applies to clear violations of the particularity clause of the requirement, and the extent to which "good faith" may be claimed for matters known or done but not presented to the issuing magistrate.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner, Douglas Toland, a person sentenced to imprisonment in the State of Arkansas (although as of the preparation of this Petition, free on appeal bond) petitions for a Writ of Certiorari to review the affirmance by the Supreme Court of Arkansas of his convictions for Possession of a Controlled Substance with Intent to Deliver and Aggravated Assault.

OPINION BELOW

The original opinion of the Supreme Court of Arkansas, reproduced in the Appendix, is reported as *Toland v. State*, ____ Ark. ____, 688 S.W.2d 718 (1985). Also included in the Appendix is the Supreme Court's order permitting a 90-day stay of the mandate to seek certiorari, and the denial of Petition for Rehearing.

JURISDICTION

The opinion of the Supreme Court of Arkansas was handed down April 22, 1985. This Court's jurisdiction is

invoked under 28 U.S.C. 1257 (3) with Petitioner asserting a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> . . . (N)o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Fourteenth Amendment, United States Constitution:

> . . . (N)or shall any state deprive any person of life, liberty or property without due process of law.

Ark. Stat. Ann. 41-1604

A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person.

Ark. Stat. Ann. 82-2617

Except as authorized by this Act it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

STATEMENT OF THE CASE

On August 13, 1983, law enforcement officers obtained a search warrant from the Municipal Judge of Clark County, Arkansas, and executed the next day a search of premises belonging to Petitioner. While on the scene, the officers found substances believed to be marijuana and a so-called "booby-trap" shotgun. Petitioner and his wife were charged with Possession of a Controlled Substance (Marijuana) with Intent to Manufacture or Deliver (Ark. Stat. Ann. 82-2617) and Aggravated Assault (Ark. Stat. Ann. 41-1604) the latter charge dealing with the booby-trap gun.

Petitioner and his wife were eventually charged in the Clark County Circuit Court in Arkadelphia, Arkansas. Various motions were filed, *inter alia*, a motion to suppress the search and seizure on grounds of violation of the particularity requirements of the U.S. and Arkansas Constitutions and for disclosure of the confidential informant whose information allegedly led to the issuance of the warrant. The motions were denied, with the exception of the informant's disclosure as to Petitioner's wife. Rather than comply, the State dismissed charges against Mrs. Toland. Petitioner proceeded to trial and was convicted of the charges and sentenced to a total of 14 years in the Arkansas Department of Correction. From the conviction and affirmance thereof, Petitioner seeks a writ of certiorari.

REASON FOR GRANTING THE WRIT

THE SEARCH AND SEIZURE OF THE INSTANT CASE, WITH A CONCEDED VIOLATION OF THE PARTICULARITY CLAUSE OF THE WARRANT REQUIREMENT AND THE NON-DISCLOSURE OF CERTAIN MATTERS TO THE MAGISTRATE, EXCEEDS THE SCOPE OF THE GOOD FAITH EXCEPTION ENUNCIATED IN *U. S. V. LEON.*

This case affords the Court an opportunity to delineate the scope of the good faith exception enunciated in *U.S. V. Leon*, ____ U.S. ____, 104 S.Ct. 3405, 82 L.Ed 2d 677 (1984) and vis-a-vis a clear and conceded violation of the particularity clause of the warrant requirement.

The factual circumstances of this case are as follows, taking the evidence in the light most favorable to the State: An officer of the Arkansas State Police met with a confidential informant who allegedly told him that Petitioner was growing marijuana on his land. The officer hired an airplane and flew over the site. He claimed that he was able to observe marijuana; this perceptual contention was severely and hotly contested at the pre-trial hearing on the motion to suppress. The officer went to the Municipal Judge and obtained a warrant for search of a red house at Route 1, Box 29-A, Gurdon, Arkansas, that could be reached by following certain instructions. The officer, accompanied by others, then searched Petitioner's residence, a *white* house, located at Route 1, Box *229-A*, Gurdon, Arkansas. And, in the words of the Arkansas Supreme Court affirming the conviction " . . . (I)t suffices to state that the directions on the warrant were impossible to follow and the information obtained from the unidentified informant was not even alleged to be reliable." The warrant failed the test enunciated in *Steele v. United States*, 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed. 757 (1925): "the officer with a search warrant, can, with reasonable effort, ascertain and identify the place intended." 267 U.S. at 503.

This clear violation of the particularity requirement was a central feature of the hearing on the Motion to Suppress. At the hearing, the officer claimed that, in addition to the overflight, he had been to the premises with the informant and had viewed the house. The trial court, and the Supreme Court also, relied upon this assertion to show that the officer knew where he was going. The Supreme Court also made a brief genuflection to the "open fields" doctrine. However, this journey, although alleged to have occurred before the issuance of the warrant, was not mentioned to the magistrate or included on the affidavit for his consideration. (Transcript p. 51) Moreover, there remains the question of how, if this viewing actually was to have occurred, how the officer could get the description, the address, and the directions so wrong.

The Arkansas Supreme Court relied on *Leon* to hold that "Officer Jenkins was obviously acting in good faith although the warrant he used was defective." *Leon*, as the Court conceded, dealt with use of the wrong form for the items that were the subject of the search. The case at bar deals with a matter more basic: the very identity of the place to be searched. The particularity provision requires compliance. There were three ways that compliance could have been made: description, address, or instructions. All three failed. "Good faith" was then found from a supposed trip to the premises not even disclosed to the issuing magistrate.

Petitioner submits that application of the good faith doctrine to an egregious violation of the particularity requirement by bootstrapping it to "knowledge" not disclosed to the magistrate, would effectively vitiate the guarantees of the Fourth Amendment. The circumstances of this case fit within two of the four *Leon* criteria for absence of good faith—the misleading of the magistrate by information known, or should have been known, to be false, and a warrant clearly facially deficient.

This case affords the Court an opportunity, therefore, to delineate the application of the good faith exception to the particularity requirement, and to decide whether non-disclosed information can be used to demonstrate good faith.

CONCLUSION

Petitioner respectfully prays that the Court grant this Petition and set this matter for oral argument.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that a typewritten copy of the above and foregoing Petition For Writ of Certiorari was mailed to Steve Clark, Attorney General, State Capitol Grounds, Little Rock, Arkansas 72201, this 20 day of June, 1985, and tendered to the U.S. Supreme Court.

/s/ John W. Achor
JOHN W. ACHOR

/s/ Jeff M. Rosenzweig
JEFF ROSENZWEIG

APPENDIX

SUPREME COURT OF ARKANSAS
No. CR 84-213

Opinion Delivered
April 22, 1984

DOUGLAS TOLAND,

APPELLANT, APPEAL FROM CLARK COUNTY CIRCUIT (CR-83-161&162)

V. HON. J. HUGH LOOKADOO, JUDGE

STATE OF ARKANSAS,

APPELLEE, AFFIRMED.

JOHN I. PURTLE, Associate Justice

The appellant was convicted of possession of marijuana with intent to deliver [Ark. Stat. Ann. § 81-2617 (a) (1) (iv) (Supp. 1983)] and of aggravated assault [Ark. Stat. Ann. § 41-1604 (Repl. 1977)]. He was sentenced to 10 years for possession and four years for aggravated assault. Sentences were ordered to run consecutively. On appeal appellant argues: (1) that the court erred in refusing to suppress evidence; (2) that the trial court erred in refusing to order the state to identify the confidential informant; and (3) that the conviction for possession is a misdemeanor rather than a felony. We do not find that the court committed prejudicial error for the reasons set out in the opinion.

The appellant and his wife, Lisa Toland, were arrested and charged with possession of a controlled substance with intent to deliver. They were also charged with aggravated assault as a result of placing a shotgun "booby-trap" in a

field near their marijuana patch. A motion to suppress contested the validity of the descriptions and directions on the search warrant and the identity of a confidential informant. During the omnibus hearing the court ordered the confidential informant's identity be disclosed to appellant's wife. Thereupon, the state dismissed the charges against Mrs. Toland.

Officer Jenkins received a tip from a confidential informant that the appellant was involved in the marijuana business. He obtained the use of an airplane and flew over appellant's property. He stated he saw marijuana growing in an open field about 100 feet behind appellant's house. The officer and the unidentified informant drove to the vicinity of appellant's property. They did not stop or go onto the property but the informant pointed out the house and land to the officer. So far as the record shows, this was the first and last information obtained from this informant. Officer Jenkins appeared before a magistrate and swore to an affidavit to obtain a warrant. Without setting out the facts in detail, it suffices to state that the directions on the warrant were impossible to follow and the information obtained from the unidentified informant was not even alleged to be reliable. For reasons to be stated below this improper procedure does not affect the result of this case.

I

THE COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE.

For the purposes of this opinion it is stated that the directions given on the warrant in this case were absolutely defective. No person could have followed the directions and ended up at the site where the search was supposed to have been conducted. So far as the record is concerned the informant furnishing the original information to Officer Jenkins was not proven dependable. There is however no rule, statute, or other procedure which prevents officers

from following through and investigating any information received by them whether by confidential informant or otherwise. In the present case Officer Jenkins did not rely solely on the informant's tip nor did he need the directions given on the warrant. He personally confirmed the information given by the informant and drove to appellant's property on the ground and flew over it in the air. Under the totality of the circumstances test stated in *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983), we have no hesitancy in affirming the trial judge's refusal to suppress the evidence received as a result of this search and seizure. This search could also be upheld under the "good faith" exception to defects in search warrants as stated in *United States v. Leon*, 104 S.Ct. 3405 (1984). Officer Jenkins was obviously acting in good faith although the warrant he used was defective. The "good faith" spoken of in *Leon* was an instance wherein the information supporting the warrant was on the wrong form. In the present case the officer executing the warrant knew exactly where he was going and what he was looking for. The results would have been the same had the information and directions in the affidavit and on the warrant been completely accurate. The appellant probably had no reasonable expectation of privacy concerning his outdoor marijuana farming operation. *Oliver v. United States*, 104 S.Ct. 1735 (1984); *Ford v. State*, 264 Ark. 141, 569 S.W.2d 105 (1978), *cert. denied*, 441 U.S. 947 (1979). Had Officer Jenkins not personally had the necessary information then it could have been argued that he was not acting in "good faith."

II

THE TRIAL COURT ERRED IN REFUSING TO ORDER THE STATE TO IDENTIFY THE CONFIDENTIAL INFORMANT.

We agree with the trial court that it was not necessary to reveal the identity of the confidential informant because appellant was charged merely with "possession." *Jackson v. State*, 283 Ark. 301, 675 S.W.2d 820 (1984).

III

THE CONVICTION FOR POSSESSION IS A MISDEMEANOR RATHER THAN A FELONY.

Appellant's third contention for reversal is that a violation of Ark. Stat. Ann. § 82-2617 (a) (1) (iv) (Supp. 1983) is a misdemeanor. We do not find in the abstract or record that this argument was presented to the trial court. Therefore, it cannot be raised for the first time on appeal. *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980). This argument will be decided very shortly in another case.

Affirmed.

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

May 28, 1985

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Re: CR 84-213. Douglas Toland
v. State of Arkansas

Gentlemen:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Dona L. Williams
Dona L. Williams, Clerk

DLW:rh

cc: Clint Miller
Billy C. Williams

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS.)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day , being the first Monday of October, A.D. 1984, amongst others were the following proceedings, to-wit:

On the 10th day of June, A.D. 1985, a day of said term _____.

DOUGLAS TOLAND)

Appellant) Appeal from Clark Circuit Court

No. CR 84-213 vs.) District

STATE OF ARKANSAS)

Appellee.)

Appellant's motion to stay mandate pending petition for Writ of Certiorari to the United States Supreme Court.

Granted 90 days on condition that surety agrees to remain on bond.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated. I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 10th day of June, A.D. 1985.

/s/ Dona L. Williams
CLERK

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-79 (2)

DOUGLAS TOLAND ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

BEST AVAILABLE COPY

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

RESPONDENT STATE OF ARKANSAS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-79

DOUGLAS TOLAND ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

RESPONDENT STATE OF ARKANSAS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I.

THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND WHICH SUPPORTS PETITIONER'S CONVICTION.

This Honorable Court should deny petitioner's petition for a writ of certiorari because there is an adequate and independent state ground which supports petitioner's conviction. It is well-established that this Court will not review a state court decision that rests on separate, adequate and independent state grounds. *See Michigan* v. *Long*, 463 U.S. 1032 (1983). In the instant case, the Arkansas Supreme Court decided, as a matter of state law, that petitioner had no reasonable expectation of privacy in his outdoor marijuana plots. *See* page three of the appendix to petitioner's petition. Petitioner's lack of a reasonable expectation of privacy is an adequate basis for his conviction and is entirely separate from the alleged deficiencies in the search warrant petitioner complains of.

CONCLUSION

THEREFORE, respondent respectfully requests that this Honorable Court deny petitioner's petition for a writ of certiorari to the Supreme Court of Arkansas.

Respectfully submitted,

JOHN STEVEN CLARK
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